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MERRILL LYNCH & CO., INC. and

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TREVOR CALLAN, TIMOTHY CALLAN
and RYAN CALLAN, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

MERRILL LYNCH & CO., INC., ET AL.,

Defendants.

CASE NO. 09-CV-0566 BEN (WMc)

**MERRILL LYNCH DEFENDANTS'
MOTION FOR JUDGMENT ON THE
PLEADINGS OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT OR PARTIAL SUMMARY
JUDGMENT:**

(1) **NOTICE OF MOTION**

(2) **REQUEST FOR
JUDICIAL NOTICE**

(3) **MEMORANDUM OF
POINTS AND AUTHORITIES**

FILED UNDER SEPARATE COVERS:

(4) **DECLARATIONS OF:**
• **MATTHEW C. KANE**
• **DIANE WALLER**
• **BRIAN BURKE**

(5) **[PROPOSED] ORDER**

(6) **[PROPOSED] JUDGMENT**

Date: June 28, 2010

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger T. Benitez

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
NOTICE OF MOTION	viii
REQUEST FOR JUDICIAL NOTICE	x
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. SUMMARY OF RELEVANT FACTS	2
A. Plaintiffs And Their Purported "Forfeiture" Claims Under The Plans	2
B. Cliff-Vesting Requirements For Awards Under The Plans	3
C. Plaintiffs' Ages And Years Of Service With Merrill Lynch	3
D. Plaintiffs Had No Vested And Unpaid Awards At The Time They Resigned	4
E. Plaintiffs' Purported "Stock Drop" & ERISA Vesting Violation Claims	4
F. The Court's Order Granting The Independent Director Defendants' Motion To Dismiss And Finding That The FACAAP Is Not An ERISA Plan.....	5
G. The Growth Plan	6
H. The WealthBuilder Plan.....	6
I. The Settlement Of The ERISA Action Approved By The SDNY Court	7
III. ARGUMENT	9
A. Applicable Legal Standards	9
B. All Of Plaintiffs' Claims Are Barred By The ERISA Action Judgment.....	11
C. The First Cause Of Action For Recovery Of Unpaid Wages Is Barred Because Plaintiffs' Unvested Awards Under The Plans Are Not "Wages"	13
D. The Second Cause Of Action For Violation Of The UCL Is Without Merit.....	17
E. The Third Cause Of Action For Conversion Fails As A Matter Of Law	18
F. The Fourth Cause Of Action For Breach Of Fiduciary Duty Is Barred.....	19

1	G.	The Fifth Cause Of Action For ERISA Violations Fails As A Matter Of Law.....	20
2	1.	The FACAAP Is Not An ERISA Plan, As The Court Previously Ruled.....	20
3	2.	The Growth Plan Also Is Not An ERISA Retirement Plan	20
4	3.	The WealthBuilder Plan Is A "Top Hat" Plan Which Is Exempt From ERISA's Vesting Provisions.....	22
5	IV.	CONCLUSION.....	25

TABLE OF AUTHORITIES

		Page(s)
1		
2		
3	FEDERAL CASES	
4	<i>Balistreri v. Pacifica Police Dept.</i>	
5	901 F.2d 696 (9th Cir. 1990).....	9
6	<i>Beckman v. Umpqua Bank</i>	
7	2007 WL 2418686 (E.D. Cal. 2007)	14
8	<i>Bell Atl. Corp. v. Twombly</i>	
9	550 U.S. 544 (2007)	9
10	<i>Branch v. Tunnell</i>	
11	14 F.3d 449 (9th Cir. 1994).....	10
12	<i>Celotex Corp. v. Catrett</i>	
13	477 U.S. 317 (1986)	10, 11
14	<i>Cho v. The Republic of Korea</i>	
15	66 Fed. Appx. 124 (9 th Cir. 2003)	18
16	<i>City of Monroe Employees Ret. Sys. v. Bridgestone Corp.</i>	
17	399 F.3d 651 (6th Cir. 2005).....	10
18	<i>Cogan v. Phoenix Life Ins. Co.</i>	
19	310 F.3d 238 (1 st Cir. 2002)	23
20	<i>Collins & Aikman Prod. Co. v. Bldg. Systems Co.</i>	
21	58 F.3d 16 (2d Cir. 1995).....	12
22	<i>Demery v. Extebank Deferred Compensation Plan (B)</i>	
23	216 F.3d 283 (2d Cir. 2000).....	5, 6, 22, 23
24	<i>Donovan v. Dillingham</i>	
25	688 F.2d 1367 (11 th Cir. 1982).....	20
26	<i>Duggan v. Hobbs</i>	
27	99 F.3d 307 (9 th Cir. 1996).....	22
28	<i>Fajardo v. County of Los Angeles</i>	
	179 F.3d 698 (9th Cir. 1999).....	9
	<i>Fields v. Thompson Printing Co.</i>	
	363 F.3d 259 (3d Cir. 2004).....	22
	<i>Gilliam v. Nevada Power Co.</i>	
	488 F.3d 1189 (9 th Cir. 2007).....	22

1	<i>Green v. Party City Corp.</i>	
2	No. CV-0109681, 2002 U.S. Dist. LEXIS 7750 (C.D. Cal. Apr. 9, 2002)	19
3	<i>Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.</i>	
4	896 F.2d 1542 (9th Cir. 1990)	9
5	<i>Heliotrope General, Inc. v. Ford Motor Co.</i>	
6	189 F.3d 971 (9th Cir. 1999)	10
7	<i>In re Johns Manville Corp.</i>	
8	340 B.R. 49 (S.D.N.Y. 2006)	12
9	<i>In re Segovia</i>	
10	404 B.R. 896 (9 th Cir. 2009)	20
11	<i>In re Silicon Graphics Inc. Securities Litigation</i>	
12	183 F.3d 970 (9th Cir. 1999)	10
13	<i>In re Spiegel Inc.</i>	
14	2006 WL 2577825 (Bkrcty. S.D.N.Y. 2006)	12
15	<i>In Re: IT Group, Inc.</i>	
16	305 B.R. 402 (D. Del. 2004)	23
17	<i>Knieval v. ESPN</i>	
18	393 F.3d 1068 (9th Cir. 2005)	10
19	<i>Lee v. City of Los Angeles</i>	
20	250 F.3d 668 (9 th Cir. 2001)	9, 10
21	<i>Mills v. Ramona Tire, Inc.</i>	
22	No. 07-CV-0052, 2007 WL 2775127 (S.D. Cal. 2007)	10
23	<i>O'Toole v. Northrop Grumman Corp.</i>	
24	499 F.3d 1218 (10th Cir. 2007)	10
25	<i>Oatway v. American Int'l Group</i>	
26	325 F.3d 184 (3d Cir. 2003)	20
27	<i>Pane v. RCA Corp.</i>	
28	868 F.2d 631 (3d Cir. 1989)	22
	<i>Parrino v. FHP, Inc.</i>	
	146 F.3d 699 (9 th Cir. 1998)	10
	<i>Pulido v. Coca-Cola Enterprises, Inc.</i>	
	No. EDCV06-406VAP(OPX), 2006 U.S. Dist. LEXIS 43765 (C.D. Cal. May 25, 2006)	19
	<i>Radobenko v. Automated Equip. Corp.</i>	
	520 F.2d 540 (9th Cir. 1975)	10, 11

1	<i>Richards v. Princeton Ins. Co.</i>	
2	178 F.Supp.2d 386 (S.D.N.Y. 2001).....	12
3	<i>Roderick v. Mazzetti & Assocs.</i>	
4	No. C 04-2436, 2004 WL 2554453 (N.D. Cal. Nov. 9, 2004).....	20
5	<i>Schaffer v. Clinton</i>	
6	240 F.3d 878 (10th Cir. 2001).....	10
7	<i>Scott v. Gulf Oil Corp.</i>	
8	754 F.2d 1499 (9 th Cir. 1985).....	20
9	<i>Stevens v. Mavent, Inc.</i>	
10	2008 WL 2824956 (C.D. Cal. 2008).....	14
11	<i>Thomas v. Home Depot USA Inc.</i>	
12	527 F.Supp.2d 1003 (N.D. Cal. 2007)	19
13	<i>Travelers Indem. Co. v. Bailey</i>	
14	129 S.Ct. 2195 (2009)	12, 13
15	<i>Turtur v. Rothschild Registry Int'l, Inc.</i>	
16	26 F.3d 304 (2d Cir. 1994)	12
17	CALIFORNIA CASES	
18	<i>Buckland v. Threshold Enterprises, Ltd.</i>	
19	155 Cal.App.4th 798 (2007).....	17
20	<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.</i>	
21	20 Cal.4 th 163 (1999).....	17
22	<i>Clark v. Superior Court</i>	
23	174 Cal.App.4th 82 (2009).....	18
24	<i>Feitelberg v. Credit Suisse First Boston, LLC</i>	
25	134 Cal.App.4th 997 (2005).....	18
26	<i>Hunter v. Sparling</i>	
27	87 Cal.App.2d 711 (1948).....	14
28	<i>Kasky v. Nike, Inc.</i>	
	27 Cal.4th 939 (2002).....	17
	<i>Korea Supply Co. v. Lockheed Martin Corp.</i>	
	29 Cal.4th 1134 (2003).....	17, 18
	<i>Kraus v. Trinity Management Services, Inc.</i>	
	23 Cal.4th 116 (2000).....	18

1	<i>Lucian v. All States Trucking Co.</i>	
2	116 Cal.App.3d 972 (1981).....	11, 13, 14
3	<i>Madrid v. Perot</i>	
4	130 Cal.App.4 th 440 (2005).....	18
5	<i>Neisendorf v. Levi Strauss & Co.</i>	
6	143 Cal.App.4 th 509 (2006).....	14, 15, 16, 17
7	<i>Oakdale Village Group v. Fong</i>	
8	43 Cal.App.4 th 539 (1996).....	18
9	<i>Prachasaisoradej v. Ralphs Grocery Co., Inc.</i>	
10	42 Cal.4th 217 (2007).....	13, 15, 16, 17
11	<i>Schachter v. Citigroup, Inc.</i>	
12	47 Cal.4 th 610 (2009).....	15, 16, 17
13	<i>Steinhebel v. Los Angeles Times Commc'ns</i>	
14	126 Cal.App.4th 696 (2005).....	17
15	<i>Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Servs., Inc</i>	
16	138 Cal.App.4 th 1215 (2006).....	17
17	OTHER STATE CASES	
18	<i>Cologne Reinsurance Co. of Am. v. Southern Underwriters, Inc.</i>	
19	630 N.Y.S.2d 548 (1995)	12
20	<i>Mount Vernon Fire. Ins. Co. v. Creative Housing Ltd.</i>	
21	645 N.Y.S.2d 433 (1996)	12
22	<i>New Hampshire Ins. Co. v. Jefferson Ins. Co. of New York</i>	
23	624 N.Y.S.2d 392 (1995)	12
24	FEDERAL STATUTES	
25	29 U.S.C. § 1002(2)	20
26	29 U.S.C. § 1051(2)	22
27	29 U.S.C. § 1053(a).....	1, 5, 20
28	29 U.S.C. § 1054(g)(1).....	23
	29 U.S.C. § 1081(a)(3)	22
	29 U.S.C. § 1101(a)(1)	22
	29 U.S.C. § 1104(a).....	1

1	CALIFORNIA STATUTES	
2	<i>Cal. Bus. & Prof. Code</i> § 16600	1, 17
3	<i>Cal. Bus. & Prof. Code</i> § 17200 <i>et seq.</i>	1
4	<i>Cal. Civil Code</i> § 1542	8
5	<i>Cal. Lab. Code</i> § 200	13
6	<i>Cal. Lab. Code</i> § 201	13
7	<i>Cal. Lab. Code</i> § 202	13
8	<i>Cal. Lab. Code</i> § 204	13
9	<i>Cal. Lab. Code</i> § 221	13
10	<i>Cal. Lab. Code</i> § 222	13
11	OTHER AUTHORITIES	
12	20 C.F.R. § 2510.3-2(c).....	21
13	Fed. R. Civ. P. 12	10, 23
14	Fed. R. Civ. P. 12(b)(6).....	9, 23
15	Fed. R. Civ. P. 12(c).....	9, 11
16	Fed. R. Civ. P. 12(d).....	10
17	Fed. R. Civ. P. 56	10, 11
18	Fed. R. Civ. P. 56(c).....	10
19	Fed. R. Civ. P. 56(e).....	10
20	Fed. R. Evid. 201	10
21		
22		
23		
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NOTICE OF MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 28, 2010 at 10:30 a.m. or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-captioned Court, located at 880 Front Street, Suite 4290, San Diego, California, Defendants MERRILL LYNCH & CO., INC. and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. ("Defendants") will and hereby do move the Court for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, or, in the alternative, Summary Judgment or Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the following grounds:

1. All of Plaintiffs' claims are barred because they were settled and released by an August 24, 2009 Order and Final Judgment entered by the United States District Court for the Southern District of New York, in *In Re Merrill Lynch & Co., Inc. Securities, Derivative & ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE), Case No. 07-cv-10268 (JSR)(DFE).

2. Plaintiffs' purported First Cause of Action for Recovery of Unpaid Wages under the California Labor Code is barred because at the time Plaintiffs resigned their employment, they had no vested awards that had not been paid under the terms of the incentive compensation plans at issue in the Complaint.

3. Plaintiff's purported Second Cause of Action for Violation of Business and Professions Code section 17200 is barred because at the time Plaintiffs resigned their employment, they had no vested awards that had not been paid under the terms of the incentive compensation plans at issue in the Complaint, and because the Complaint contains no allegation which could give rise to the right to restitution or injunctive relief.

4. Plaintiff's purported Third Cause of Action for Conversion is barred because at the time Plaintiffs resigned their employment, they had no vested awards that had not been paid under the terms of the incentive compensation plans at issue in the Complaint and because California law does not recognize a conversion claim based on allegedly unpaid wages.

REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE ROGER T. BENITEZ AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

REQUEST IS HEREBY MADE by Defendants, pursuant to Rule 201 of the Federal Rules of Evidence, that the Court take judicial notice of the following documents in connection with this Motion:

1. Complaint filed in this action on March 19, 2009 (Dkt. #1), a true and correct copy of which is annexed as Exhibit A to the concurrently filed Declaration of Matthew C. Kane.

2. Order and Final Judgment in *In Re Merrill Lynch & Co., Inc. Securities, Derivative & ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE), Case No. 07-cv-10268 (JSR)(DFE), entered on August 24, 2009 by the United States District Court for the Southern District of New York (Master File Docket Entry No. 253-2), a true and correct copy of which is annexed as Exhibit B to the concurrently filed Declaration of Matthew C. Kane.

3. Consolidated Supplemental Complaint filed in *In Re Merrill Lynch & Co., Inc. Securities, Derivative & ERISA Litigation*, S.D.N.Y. Master File No. 07-cv-9633 (JSR)(DFE) (Docket Entry No. 109), Case No. 07-cv-10268 (JSR)(DFE) (Docket Entry No. 64), a true and correct copy of which is annexed as Exhibit C to the concurrently filed Declaration of Matthew C. Kane.

4. Order Granting in Part and Denying in Part Independent Directors' Motion to Dismiss Complaint entered in this action on January 22, 2010 (Dkt. #79), a true and correct copy of which is annexed as Exhibit D to the concurrently filed Declaration of Matthew C. Kane.

1 5. Declaration of Jennifer M. Keough filed in *In Re Merrill Lynch & Co., Inc.*
 2 *Securities, Derivative & ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE) (Docket Entry
 3 No. 257, Exh. #1), Case No. 07-cv-10268 (JSR)(DFE), a true and correct copy of which is
 4 annexed as Exhibit A to the concurrently filed Declaration of Brian Burke.

5
 6 6. Merrill Lynch Financial Advisor Capital Accumulation Award Plan alleged in the
 7 Complaint, a true and correct copy of which is annexed as Exhibit A to the concurrently filed
 8 Declaration of Diane Waller.

9
 10 7. Merrill Lynch Growth Award Plan For Financial Advisors alleged in the
 11 Complaint, a true and correct copy of which is annexed as Exhibit B to the concurrently filed
 12 Declaration of Diane Waller.

13
 14 8. Merrill Lynch Wealthbuilder Account Plan alleged in the Complaint, a true and
 15 correct copy of which is annexed as Exhibit C to the attached Declaration of Diane Waller.

16
 17 9. Uniform Application for Securities Industry Registration Or Transfer Form ("Form
 18 U-4") for Plaintiff Trevor Callan filed with the National Association of Securities Dealers, a true
 19 and correct redacted copy of which is annexed as Exhibit D to the concurrently filed Declaration
 20 of Diane Waller.

21
 22 10. Uniform Application for Securities Industry Registration Or Transfer Form ("Form
 23 U-4") for Plaintiff Timothy Callan filed with the National Association of Securities Dealers, a true
 24 and correct redacted copy of which is annexed as Exhibit E to the concurrently filed Declaration of
 25 Diane Waller.

26
 27 11. Uniform Application for Securities Industry Registration Or Transfer Form ("Form
 28 U-4") for Plaintiff Ryan Callan filed with the National Association of Securities Dealers, a true

1 and correct redacted copy of which is annexed as Exhibit F to the concurrently filed Declaration of
2 Diane Waller.

3
4 12. Retirement Accumulation Plan Allocation Summary for Plaintiff Trevor Callan, a
5 true and correct copy of which is annexed as Exhibit G to the concurrently filed Declaration of
6 Diane Waller.

7
8 13. Retirement Accumulation Plan Allocation Summary for Plaintiff Timothy Callan, a
9 true and correct copy of which is annexed as Exhibit H to the concurrently filed Declaration of
10 Diane Waller.

11
12 14. Retirement Accumulation Plan Allocation Summary for Plaintiff Ryan Callan, a
13 true and correct copy of which is annexed as Exhibit I to the concurrently filed Declaration of
14 Diane Waller.

15
16 DATED: May 28, 2010

McGUIREWOODS LLP

17
18 By: /s/ Matthew C. Kane
19 Matthew C. Kane
20 Bethany A. Pelliconi
21 Sylvia J. Kim
22 Attorneys for Defendants
23 MERRILL LYNCH & CO., INC. and
24 MERRILL, LYNCH, PIERCE, FENNER &
25 SMITH, INC.
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendants Merrill Lynch & Co., Inc. ("MLC") and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch" or "MLPFS") bring this Motion for Judgment on the Pleadings or, In the Alternative, for Summary Judgment or Partial Summary Judgment ("Motion") against Plaintiffs Trevor Callan, Timothy Callan and Ryan Callan ("Plaintiffs"). Plaintiffs were employed by Merrill Lynch as Financial Advisors ("FA's"). All of their claims in this action are based on Plaintiffs' participation in three Merrill Lynch incentive compensation plans for FA's (the "Plans"):

1. The **Financial Advisor Capital Accumulation Award Plan** (the "FACAAP")¹;
2. The **Growth Award Plan For Financial Advisors** (the "Growth Plan"); and
3. The **WealthBuilder Account Plan** (the "WealthBuilder Plan").

Plaintiffs assert that Defendants unlawfully forfeited their unvested awards under the Plans, and that they suffered "stock drop" losses in the value of those unvested awards. On this basis, their Complaint purports to allege causes of action for: (1) Recovery of Unpaid Wages under the California Labor Code ("CLC"); (2) Violation of *Cal. Bus. & Prof. Code* § 17200 *et seq.* (the "UCL") based on an alleged predicate violation of *Cal. Bus. & Prof. Code* § 16600; (3) Conversion; (4) Breach of Fiduciary Duty; and (5) Violation of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. §§ 1053(a) and 1104(a). As we discuss in detail below, each and every one of these claims is barred for the following reasons:

1. **All of Plaintiffs' claims were settled and released by an August 24, 2009 Order and Final Judgment entered by the United States District Court for the Southern District of New York** (the "SDNY Court") in *In Re Merrill Lynch & Co., Inc. Securities, Derivative & ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE), Case No. 07-cv-10268 (JSR)(DFE) (the "ERISA Action").
2. **Plaintiffs had no vested awards under the Plans that have not been paid as of the time they resigned their employment with Merrill Lynch.** Thus, Plaintiffs cannot establish that they were subjected to any unlawful forfeiture of wages under the California Labor Code as alleged in their First

¹ This short-hand name is commonly pronounced "F-Cap".

Cause of Action, that they were subjected to a violation of the UCL as alleged in the Second Cause of Action, or that Defendants "converted" any of their "property" as alleged in the Third Cause of Action.

3. **California law does not recognize a "conversion" claim based on a Labor Code violation.** Therefore, Plaintiffs' Third Cause of Action is barred on this basis as well.
4. **Plaintiffs have not alleged facts constituting a breach of fiduciary duty by Defendants or that they suffered any resulting damages.** Therefore, as the Court held in its January 22, 2010 Order with respect to the FACAAP and the now-dismissed individual co-defendants, (Kane Decl., Exh. D [Dkt. #79]), the Fourth and Fifth Causes of Action for Breach of Fiduciary Duty and Violation of ERISA, respectively, are barred.
5. **None of the Plans are subject to ERISA's minimum vesting requirements.** As the Court also held in its January 22nd Order, *the FACAAP is not an ERISA benefit plan*. Likewise, *the Growth Plan also is not an ERISA benefit plan*, and *the WealthBuilder Plan is a "top hat" plan under ERISA* which is exempt from such requirements. Therefore, the Fifth Cause of Action for Violation of ERISA is barred on this basis too.

Accordingly, Defendants are entitled to judgment in their favor as a matter of law on Plaintiffs' Complaint and each and every purported cause of action alleged therein.

II. SUMMARY OF RELEVANT FACTS

A. Plaintiffs And Their Purported "Forfeiture" Claims Under The Plans.

Plaintiffs, who are former Merrill Lynch FA's, were eligible to participate in some or all of the Plans – the FACAAP, the Growth Plan, and/or the WealthBuilder Plan. Kane Decl., Exh. A at ¶¶ 6-9. They bring this action on behalf of themselves individually, and as a putative class action seeking to represent the following classes:

"A. The 'California Class' consists of all individuals who were employed by Merrill Lynch in the State of California and who, within the applicable statute of limitations, allegedly forfeited awards under the Merrill Lynch FACAAP, Growth Award, or WealthBuilder plans as a result of becoming employed by a competitor of Merrill Lynch."

"B. The 'Nationwide Class' consists of all individuals who were employed by Merrill Lynch anywhere in the United States who, within the applicable statute of limitations, received awards under the Merrill Lynch FACAAP, Growth Award, or WealthBuilder plans." *Id.*, ¶¶ 9.A, 9.B.

Plaintiffs' First, Second, and Third Causes of Action for Recovery of Unpaid Wages under

the CLC, violation of the UCL, and Conversion, respectively, are based on an *ambiguous insinuation* that they "forfeited" awards under the Plans on the basis of provisions in the Plans which allegedly prevented them from competing with Merrill Lynch. *Id.*, at ¶ 8. Specifically, they allege that they ***resigned their employment in January 2007***, that Merrill Lynch "rejected" their demands for awards under the Plans on grounds that they had been forfeited, and that each Plan had a clause that provided for forfeiture of awards if they were to leave their employment to work for a competitor. *Id.*, at ¶ 7. ***Notably, Plaintiffs have not actually alleged that they had awards "forfeited" under the Plans because of their working for a competitor of Merrill Lynch.*** Their artful pleading in this respect is deliberately designed to obscure the fact that ***they had no vested awards under any of the Plans*** which had not been paid as of the time they resigned.

B. Cliff-Vesting Requirements For Awards Under The Plans.

Under the **FACAAP**, awards made to FA's after 2002 vest pursuant to a "cliff-vesting" schedule on December 31st of the **eighth year** following the award year, and all *unvested* awards are forfeited upon the termination of employment if the termination occurs prior to age 65 or prior to completion of at least 20 years of service under the "Rule of 65." Waller Decl., Exh. A at §§ 8, 9(c)(ii).

Under the **Growth Plan**, awards made to FA's vest pursuant to a "cliff-vesting" schedule four full years after they have been granted, and all *unvested* awards are forfeited upon the termination of employment if the termination occurs prior to age 65 or prior to completion of at least 20 years of service under the "Rule of 65." *Id.*, Exh. B at pp. 3-6.

Under the **WealthBuilder Plan**, awards made to FA's vest only if they (i) reach age 55 and have at least 10 years of service with Merrill Lynch, or (ii) reach age 65 with no length of service requirement, or (iii) have completed 20 years of service. *Id.*, Exh. C at Art. VI-VIII.

C. Plaintiffs' Ages And Years Of Service With Merrill Lynch.

All three Plaintiffs resigned their employment with Merrill Lynch on **January 12, 2007**. At that time, they were all ***under the age of 36*** and none of them had been employed by Merrill Lynch for more than 12 years. Waller Decl., ¶¶ 7-11, Exhs. D-F. Therefore, *none* of the Plaintiffs qualified for vesting under the WealthBuilder Plan, or under the alternative vesting provisions of

1 the FACAAP and Growth Plan based on their ages and years of service with Merrill Lynch.

2 **D. Plaintiffs Had No Vested And Unpaid Awards At The Time They Resigned.**

3 Under the express provisions of each of the Plans, *all* of Plaintiffs' outstanding awards
4 were *unvested* at the time they resigned. As such, Plaintiffs did not "forfeit" any *vested* awards
5 under the Plans when they resigned. Rather, any *vested* awards were in fact paid in accordance
6 with the Plans. Waller Decl., ¶¶ 7-11.

7 In this regard, only Plaintiff **Trevor Callan** had vested awards under the FACAAP and the
8 Growth Plan as of December 31, 2006, and he was paid out for both of those awards in January
9 2007, shortly before he resigned. *Id.*, ¶ 8. He had no other *vested* awards at the time he resigned
10 his employment. *Id.*

11 Plaintiff **Timothy Callan** had no *vested* awards under any of the Plans when he resigned.
12 His first award under the FACAAP was made in 2001 and, under its eight-year cliff-vesting
13 schedule, it would not have vested until December 31, 2009 – almost three years after he resigned.
14 *Id.*, ¶ 9. His first award under the Growth Plan was in 2003, so it would not have vested until four
15 full years later in 2007, after his January 12, 2007 resignation. *Id.*

16 Plaintiff **Ryan Callan** also had no *vested* awards under any of the Plans when he resigned.
17 The first year he received any awards under the FACAAP and Growth Plans was in 2004 and,
18 under their respective eight-year and four-year cliff-vesting schedules, they would not have vested
19 until 2012 and 2008, respectively, well after he resigned in January 2007. *Id.*, ¶ 10.

20 Thus, at the time Plaintiffs resigned their employment in January 2007, they had no vested
21 and unpaid awards under any of the Plans. *Id.*, ¶¶ 7-11. Accordingly, no "forfeiture" of any
22 vested awards occurred, making whether Plaintiffs had resigned to work for a Merrill Lynch
23 competitor wholly irrelevant, notwithstanding that it forms the *insinuated* basis for their purported
24 First through Third Causes of Action.

25 **E. Plaintiffs' Purported "Stock Drop" & ERISA Vesting Violation Claims.**

26 In support of their Fourth Cause of Action for Breach of Fiduciary Duty, which is brought
27 as a common law claim and relates *solely* to the FACAAP, Plaintiffs allege that Merrill Lynch's
28 "aggressive expansion" into the subprime mortgage market, failure to manage risk, and failure to

1 disclose the full extent of its exposure led to the artificial inflation and "precipitous decline" of
 2 Merrill Lynch's stock. Kane Decl., Exh. A. at ¶ 31. They further allege that Defendants had a
 3 "fiduciary duty under the FACAAP to make adjustments to the FACAAP to preserve the benefit
 4 of the Plan" and "compensate for the decline in the price of Merrill Lynch's common stock". *Id.*,
 5 at ¶ 32. They also allege that as a result of not making any such adjustments, they have been
 6 damaged in an unspecified amount. *Id.*, at ¶ 33.

7 Plaintiffs' purported Fifth Cause of Action for ERISA violations has two aspects two it.
 8 *First*, with respect to *all of the Plans*, Plaintiffs allege that the Plans violate the *minimum vesting*
 9 *standards* set forth in 29 U.S.C. § 1053(a). *Id.*, at ¶ 37. *Second*, with respect to *only the FACAAP*,
 10 Plaintiffs allege that Defendants breached their fiduciary duty under ERISA based on the same
 11 subprime mortgage market expansion allegations made in support of their common law breach of
 12 fiduciary duty claim. *Id.*, at ¶¶ 38-42.

13 **F. The Court's Order Granting The Independent Director Defendants' Motion**
 14 **To Dismiss And Finding That The FACAAP Is Not An ERISA Plan.**

15 On January 22, 2010, this Court granted, in part, a Motion to Dismiss Plaintiffs' Fourth
 16 and Fifth Causes of Action for Breach of Fiduciary Duty and Violations of ERISA, respectively,
 17 as against the now-dismissed "Independent Director Defendants."² See Kane Decl., Exh. D (Dkt.
 18 #79) at 1:18-24. The Court's Order correctly concluded that the Plaintiffs' Fourth and Fifth
 19 Causes of Action failed to state a claim upon which relief could be granted to the extent they are
 20 based on the FACAAP, because it "does not qualify as an 'employee pension benefit plan' under
 21 ERISA." *Id.*, at 5:26-6:6. As the Court reasoned:

22 "By its express terms, the FACAAP does not have a retirement purpose or provide
 23 a systematic deferral of compensation. Rather, it is clear the FACAAP is intended
 24 merely as a bonus program to award top performing employees and provide
 25 financial incentive for employees to remain with Merrill Lynch and improve their
 performance there. There is nothing in the FACAAP that would allow a reasonable

26 ² Those Defendants were Carol T. Christ, Armando M. Codina, Virgis W. Colbert, Jill K.
 27 Conway, Alberto Cribiore, John D. Finnegan, Aulana L. Peters, Joseph W. Prueher, Ann N.
 28 Reese, and Charles O. Rossotti.

1 person to calculate or determine the benefits of the plan or procedure for receiving
 2 benefits, as those matters are left to the sole discretion of Merrill Lynch.
 3 Additionally, no employee is guaranteed awards under the FACAAP; he or she is
 4 given awards only according to the company's assessment of his or her
 contribution of the financial well-being of the company. Accordingly, the
 FACAAP does not qualify as an 'employee pension benefit plan' under ERISA."
Id., at 5:26-6:6.

5
 6 The Court also held that Plaintiffs' Complaint failed to state a claim for breach of fiduciary
 7 duty as against the Independent Director Defendants, because fiduciaries are "not required to
 8 insure against losses, only to act with care, prudence, and diligence under the circumstances" and
 9 because no claim for breach of fiduciary duty is established merely by pleading that a company
 10 took a risk and suffered a loss. *Id.*, at 9:3-8.³

11 **G. The Growth Plan.**

12 The Growth Plan contains terms which are virtually identical to those in the FACAAP,
 13 showing that it too is nothing more than a bonus program to award top performing employees and
 14 provide financial incentive for employees to remain with Merrill Lynch and improve their
 15 performance there. Waller Decl., Exh. B at §§ 1, 3.1(b). There is nothing in the Growth Plan that
 16 would allow a reasonable person to calculate or determine the benefits of the plan or the procedure
 17 for receiving benefits, as those matters are left to the sole discretion of Merrill Lynch. *Id.*
 18 Additionally, no employee is guaranteed awards under the Growth Plan; he or she is given awards
 19 only according to the company's assessment of his or her contribution of the financial well-being
 20 of the company. *Id.*

21 **H. The WealthBuilder Plan.**

22 The WealthBuilder Plan is a "top hat" plan which was created for the express purpose "of
 23 providing deferred compensation for the members of a select group of management or highly
 24

25 ³ The Court denied the Independent Director Defendants' Motion to Dismiss the Fifth
 26 Cause of Action, in part, and without prejudice, because their Motion addressed only the
 27 FACAAP and did not address the Plaintiffs' allegations that the other two plans – the Growth and
 28 WealthBuilder Plans – violated ERISA's minimum vesting standards. *Id.*, at 9:27-10:3. This
 Motion brought by the Merrill Lynch Defendants now addresses that issue as to those plans.

1 compensated employees, within the meaning of Title 1 of ERISA, who remain in the employ of
 2 the Company until retirement or completion of a substantial period of service as specified in the"
 3 WealthBuilder Plan. *Id.*, Exh. C, p. 1 at Art. 1. Eligibility to participate in the WealthBuilder Plan
 4 is limited to top-producing FA's who have a title of at least Vice President. *Id.*, p. 4 at § 3.1. Since
 5 January 1, 2005, less than 15% of Merrill Lynch's total workforce has been eligible to participate
 6 in the WealthBuilder Plan each calendar year, and the average compensation of the participants in
 7 the plan has been more than double that of all Merrill Lynch employees. *Id.*, ¶ 6.

8 **I. The Settlement Of The ERISA Action Approved By The SDNY Court.**

9 In addition to the FACAAP, Growth Plan, and WealthBuilder Plans at issue in this action,
 10 Plaintiffs also participated in certain Merrill Lynch retirement plans, including the **Merrill Lynch**
 11 **& Co., Inc. Retirement Accumulation Plan** (the "RAP"), and their RAP accounts included
 12 investments in **Merrill Lynch stock** during the time period of **September 30, 2006 to December,**
 13 **31, 2008.** Waller Decl., Exhs. D-F.

14 On August 24, 2009, the SDNY Court entered an Order and Final Judgment (the
 15 "Judgment") in the ERISA Action approving a Stipulation And Agreement of Settlement (the
 16 "Settlement Stipulation"). Kane Decl., Exh. B. The Settlement Stipulation approved by the
 17 Judgment defined the settlement "**Class**" as follows:

18 "a non-opt out class consisting of (a) ***all current and former participants and***
 19 ***beneficiaries of any of the Plans*** whose individual Plan account(s) included
 20 ***investments in Merrill Lynch stock*** at any time ***during the Class Period . . .***"
 Kane Decl., Exh. B, Exh. 1, p. 5 at § 1.3 (emphasis added).

21 The Settlement Stipulation also defined the "**Plans**" (as used in the "Class" definition) as
 22 follows: "the Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan; the **Merrill Lynch**
 23 **& Co., Inc. Retirement Accumulation Plan**; and the Merrill Lynch & Co., Inc. Employee Stock
 24 Ownership Plan, together with their Predecessors and Successors-in-Interest, and any trust created
 25 under such plans." *Id.*, p. 9 at § 1.33 (emphasis added).

26 The Settlement Stipulation further defined the **Class Period** as **September 30, 2006 to**
 27 **December 31, 2008**, inclusive. *Id.*, p. 5 at § 1.5.

1 Under Section 1.41 of the Settlement Stipulation, the "**Settled Claims**" under the release
2 approved by the Judgment are *broadly defined* to include:

3 "[A]ny and all claims, debts, demands, rights or causes of action, suits, matters,
4 and issues or liabilities *whatsoever* (including, but not limited to, any claims for
5 damages, interest, attorneys' fees, expert or consulting fees, and *any other costs,*
6 *expenses or liability whatsoever*), whether based on *federal, state, local, statutory*
7 *or common law or any other law, rule or regulation*, whether fixed or contingent,
8 accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or
9 unmatured, whether *class or individual in nature*, including both known claims
10 and *Unknown Claims* (as defined herein), against any of the *Released Parties* (i)
that *have been asserted* in the *ERISA Action*, or (ii) that *could have been asserted*
11 *in any forum* by any *Class Member* or their successors and assigns which *arise out*
12 *of* or are based upon the *allegations*, transactions, facts, matters or occurrences,
13 representations or omissions out of which the claims asserted in the *ERISA Action*
14 arise. . . ." *Id.*, p. 10 at § 1.41 (emphasis added and in original).

11 Under Section 1.49 of the Settlement Stipulation, the "**Unknown Claims**" released by the
12 Judgment likewise are *broadly defined* to include an express waiver by each Class Member of
13 "any and all provisions, rights and benefits conferred by any law of any state of the United States,
14 or principle of common law, or otherwise, which is similar, comparable, or equivalent to
15 California Civil Code § 1542 . . ." and further provides that ". . . Class Members by operation of
16 law shall be deemed to have acknowledged, that the inclusion of 'Unknown Claims' in the
17 definition of Settled Claims . . . was separately bargained for and was a key element of the
18 Settlement." *Id.*, p. 13 at § 1.49.

19 Under Section 10.11 of the Settlement Stipulation, its construction and interpretation are
20 governed by the internal laws of the State of New York without regard to conflicts of laws, except
21 to the extent that federal law governs. *Id.*, p. 26 at § 10.11.

22 The claims asserted in the ERISA Action – like those asserted here – arose out of Merrill
23 Lynch's compensation arrangements with the Class members and its exposure to collateralized
24 debt obligations (CDOs) and subprime mortgage-backed securities. The ERISA Action plaintiffs
25 alleged that Merrill Lynch "withheld information about the true extent of its net exposure to CDO
26 securities and subprime mortgages [and] . . . made false and misleading statements about its
27 exposure . . . thereby *artificially inflating the value of shares of Merrill Lynch Stock* . . . in the
28 Plans", and that the ERISA Action defendants breached their fiduciary duty when they "*allowed*

1 *the imprudent investment* of the Plans' assets *in Merrill Lynch common stock*" knowing that
 2 "such investment was unduly risky". Kane Decl., Exh. C at ¶¶ 5-6.

3 As members of the settlement Class in the ERISA Action, Plaintiffs received notice of the
 4 settlement. Burke Decl., ¶¶ 3-5 and Exh. A (Keough Decl.) attached thereto.

5 **III. ARGUMENT**

6 **A. Applicable Legal Standards.**

7 Fed. R. Civ. P. 12(c) provides, "After the pleadings are closed – but early enough not to
 8 delay trial – a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The
 9 standard applied by the Court in deciding a motion for judgment on the pleadings is virtually
 10 identical to the standard for dismissal for failure to state a claim upon which relief can be granted
 11 pursuant to Fed. R. Civ. P. 12(b)(6). *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th
 12 Cir. 1999). Thus, judgment on the pleadings is appropriate when, even if all material facts in the
 13 pleading under attack are true, the moving party is entitled to judgment as a matter of law. *Hal*
 14 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

15 Like a Rule 12(b)(6) motion, a Rule 12(c) motion challenges the legal sufficiency of an
 16 opposing party's pleadings. "When a federal court reviews the sufficiency of a complaint, before
 17 the reception of any evidence either by affidavit or admissions, its task is necessarily a limited
 18 one." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Dismissal is proper
 19 where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts
 20 alleged under a cognizable legal theory." *Id.* The facts alleged in a complaint "must be enough to
 21 raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554
 22 (2007). "While a complaint . . . does not need detailed factual allegations . . . a plaintiff's
 23 obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and
 24 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at
 25 555. To survive this motion, plaintiff's allegations must be plausible on their face. *Id.* at 570.

26 In ruling on a motion under Rule 12(c) or Rule 12(b)(6), the Court may consider
 27 documents which are not attached to the Complaint if the authenticity of the documents is not
 28 contested and if the complaint necessarily relies on facts set forth in the documents. *See Lee v.*

1 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th
 2 Cir. 2005); *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999);
 3 *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *Mills v. Ramona Tire, Inc.*, No. 07-CV-0052,
 4 2007 WL 2775127, * 3 (S.D. Cal. 2007). In addition, the Court may take judicial notice of
 5 "matters of public record" under Fed. R. Evid. 201. See *Heliotrope General, Inc. v. Ford Motor*
 6 *Co.*, 189 F.3d 971, 981 n. 18 (9th Cir. 1999). Judicial notice may be taken under Rule 201 as to
 7 any records which are capable of immediate and accurate verification through reliable sources.
 8 See *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218 (10th Cir. 2007) (allowing judicial
 9 notice of plaintiff's earnings history as published on defendant's website); *Schaffer v. Clinton*, 240
 10 F.3d 878, 885 n.8 (10th Cir. 2001) (allowing judicial notice of information found in a political
 11 reference almanac); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655,
 12 n. 1 (6th Cir. 2005) (allowing judicial notice of a term defined on the NASD website).

13 Consideration of such extrinsic evidence does not convert a Rule 12 motion into a motion
 14 for summary judgment under Rule 56 where the extrinsic evidence contains facts necessarily
 15 relied upon in the complaint and the authenticity of the evidence is not contested. *Lee, supra*, 150
 16 F.3d at 688; *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). However, in considering
 17 extrinsic evidence on a motion for judgment on the pleadings, the Court *may* treat the motion as
 18 one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). Summary judgment is
 19 appropriate if the pleadings and affidavits show "there is no genuine issue as to any material fact
 20 and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The
 21 party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue
 22 of material fact requiring judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,
 23 323-25 (1986). A fact is material if it is essential to the proper disposition of the claim.
 24 *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540 (9th Cir. 1975). If the moving party carries
 25 its initial burden, the non-moving party must then set forth "special facts" outside the pleadings
 26 and admissible into evidence which would convince a rational trier of fact to find for the
 27 nonmovant. Fed. R. Civ. P. 56(e). If the non-moving party fails to make a sufficient showing on
 28 an essential element of its case with respect to which it has the burden of proof, the moving party

1 is entitled to summary judgment. *Celotex Corp.*, 477 U.S. at 325. The mere existence of a factual
 2 dispute will not automatically necessitate denial of the motion; rather, only factual disputes that
 3 are material can preclude entry of summary judgment. *Radobenko*, 520 F.2d at 543-44.

4 All of the extrinsic evidence offered in support of this Rule 12(c) motion may be
 5 considered by the Court without converting it into a Rule 56 motion, because the Complaint
 6 necessarily relies on the facts contained in that evidence. Specifically, because the Complaint
 7 alleges Plaintiffs' forfeiture of awards under the Plans, the governing documents for the Plans and
 8 evidence related to the vesting of and payments made for each Plaintiff's awards, including
 9 Plaintiffs' ages and dates of employment, is "necessarily relied upon" in the Complaint.
 10 Notwithstanding, Defendants prophylactically seek, in the alternative, summary judgment under
 11 Rule 56 if the Court determines that it can only consider the extrinsic evidence in that context.

12 **B. All Of Plaintiffs' Claims Are Barred By The ERISA Action Judgment.**

13 Plaintiffs participated in the RAP retirement plan, and their RAP accounts included
 14 investments in Merrill Lynch stock between September 30, 2006 and December, 31, 2008. Waller
 15 Decl., Exhs. G-I. Accordingly, Plaintiffs are members of the "Class" and are "Class Members" as
 16 defined in the Settlement Stipulation approved by the Judgment in the ERISA Action. Kane
 17 Decl., Exh. B, Exh. 1, p. 5 at § 1.3, p. 9 at § 1.33. Moreover, all of the Plaintiffs' claims being
 18 asserted in this action "arise out of or are based upon the allegations, transactions, facts, matters or
 19 occurrences, representations or omissions" asserted in the ERISA Action, including without
 20 limitation Merrill Lynch's dealings with its employees (including FA's) in providing them with
 21 compensation. Indeed, certain of the Plaintiffs' claims in this action arise from the *exact same*
 22 alleged misrepresentations about the *exact same* investment portfolios made in the *exact same*
 23 SEC filings and public disclosures, allegedly resulting in the *exact same* decline in the value of
 24 Merrill Lynch stock as alleged in the ERISA Action. *Id.*, Exh. C, ¶¶ 5-6. Thus, all of the
 25 purported claims Plaintiffs are asserting against the Defendants in this action are claims that could
 26 have been – and indeed some of them have been – asserted in the ERISA Action prior to the final
 27 approval of the Settlement Stipulation by the SDNY Court. *Id.*, Exh. B, Exh. 1, p. 8 at § 1.24, p.
 28 10 at § 1.41, p. 13 at § 1.49.

1 Under both New York and federal law which apply to the Settlement Stipulation and the
 2 Judgment, ***the release of the "Settled Claims" in the ERISA Action bars all of the claims being***
 3 ***asserted in this action.*** Indeed, "[i]n many areas of law . . . the use of '*arising out of*' language in
 4 a contract is considered ***unambiguous*** and viewed as reasonably supporting ***only a broad***
 5 ***reading.***" *In re Spiegel Inc.*, 2006 WL 2577825, * 10 (Bkrtcy. S.D.N.Y. 2006) (emphasis added).
 6 See, e.g., *Cologne Reinsurance Co. of Am. v. Southern Underwriters, Inc.*, 630 N.Y.S.2d 548, 549
 7 (1995) (arbitration agreement – "arising out of" is considered "broadly worded" to encompass both
 8 contract and tort claims); *Collins & Aikman Prod. Co. v. Bldg. Systems Co.*, 58 F.3d 16, 20 (2d
 9 Cir. 1995) (arbitration agreement – "arising out of" is "the paradigm of a broad clause"); *Mount*
 10 *Vernon Fire. Ins. Co. v. Creative Housing Ltd.*, 645 N.Y.S.2d 433 (1996) (insurance – "arising out
 11 of" is unambiguous and is to be applied broadly in determining scope of provision); *New*
 12 *Hampshire Ins. Co. v. Jefferson Ins. Co. of New York*, 624 N.Y.S.2d 392, 395 (1995) (insurance –
 13 the words "arising out of" are deemed to be "broad, general, comprehensive terms ordinarily
 14 understood to mean originating from, incident to, or having connection with"); *Richards v.*
 15 *Princeton Ins. Co.*, 178 F.Supp.2d 386, 392-93 (S.D.N.Y. 2001) (insurance – "[t]he term 'arising
 16 out of' is to be interpreted in a broad and comprehensive sense"); *Turtur v. Rothschild Registry*
 17 *Int'l, Inc.*, 26 F.3d 304, 309-10 (2d Cir. 1994) (stock subscription agreement – "arising out of" was
 18 "sufficiently broad to cover" both tort and contract claims).

19 The scope of a release in a judicially-approved class action settlement agreement is viewed
 20 through the same prism. For example, in *In re Johns Manville Corp.*, 340 B.R. 49, 60 (S.D.N.Y.
 21 2006), the district court concluded: "The Court's repeated use of the term 'arising out of' and
 22 'related to' were not gratuitous or superfluous; they were meant to provide the broadest [third party
 23 plan release] protection possible to facilitate global finality for Travelers as a necessary condition
 24 for it to make a significant contribution to the Manville estate." (Emphasis added). On appeal
 25 from this ruling, the U.S. Supreme Court affirmed the district court's ruling. *Travelers Indem. Co.*
 26 *v. Bailey*, 129 S.Ct. 2195, 2203 (2009). In doing so, the high court reaffirmed that ***"arising out***
 27 ***of" language in judicially-approved class action settlements must be construed broadly.*** *Id.* In
 28 *Travelers*, the Supreme Court was called upon to construe language in an order similar to that in

1 the ERISA Action Judgment enjoining the pursuit of "Policy Claims," which covered "not only
 2 'claims,' but even 'allegations' relating to the insurance coverage." *Id.* (emphasis added). The
 3 Supreme Court held that "[a]lthough it would be possible (albeit quite a stretch) to suggest that a
 4 'claim' only relates to Travelers' insurance coverage if it seeks recovery based upon Travelers'
 5 specific contractual obligation to Manville, '*allegations' is not even remotely amenable to such a*
 6 *narrow construction and clearly reaches factual assertions that relate in a more comprehensive*
 7 *way* to Travelers' dealings with Manville." *Id.* (emphasis added). "[W]here the plain terms of a
 8 court order unambiguously apply, as they do here, they are entitled to their effect." *Id.* at 2204.

9 The Settlement Stipulation approved by the Judgment in the ERISA Action is expressly
 10 intended "to be a *final* and *complete* resolution of *all disputes asserted* or which *could be asserted*
 11 by the *Class Members* against the *Released Parties* with respect to the *Settled Claims*." Kane
 12 Decl., Exh. B., Exh. 1, p. 25 at § 10.3 (emphasis added and in original). With that intention, and
 13 under the foregoing authorities, *all* of Plaintiffs' purported claims asserted in this action fall
 14 squarely within the "Settled Claims" settled and released by the Settlement Stipulation.
 15 Accordingly, on this basis alone, Defendants are entitled to judgment in their favor on Plaintiffs'
 16 entire Complaint. As we discuss next, in the event the Court disagrees, each of Plaintiffs' claims
 17 still fail as a matter of law and Defendants are still entitled to judgment in their favor.

18 C. **The First Cause Of Action For Recovery Of Unpaid Wages Is Barred Because**
 19 **Plaintiffs' Unvested Awards Under The Plans Are Not "Wages".**

20 Plaintiffs' First Cause of Action is based on Defendants' purported failure to pay wages
 21 under *Cal. Labor Code* §§ 201, 202, 204, 221, and 222. Kane Decl., Exh. A at ¶ 22. The term
 22 "wages," as used in the California Labor Code, "includes all amounts for labor performed by
 23 employees of every description, whether the amount is fixed or ascertained by the standard of
 24 time, task, piece, commission basis, or other method of calculation." *Cal. Lab. Code* § 200. As
 25 the California Supreme Court recently put it, the obligation to pay wages is *a matter of contract*,
 26 defined as: "the amount the employer has offered or promised to pay, or has paid pursuant to such
 27 an offer or promise, as compensation for the employee's labor." *Prachasaisoradej v. Ralphs*
 28 *Grocery Co., Inc.*, 42 Cal.4th 217, 228 (2007). Of course, *no contractual promise is breached if*

1 the employer's promise to pay wages is *contingent upon future events which have not been*
 2 *satisfied. Neisendorf v. Levi Strauss & Co.*, 143 Cal.App.4th 509, 522 (2006).

3 Accordingly, California laws prohibiting the forfeiture of "wages" are *not applicable* in the
 4 context of a bonus or profit-sharing plan *until and unless "all conditions agreed to in advance for*
 5 *earning those wages have been satisfied."* *Id.* (emphasis added). As the *Neisendorf* court held:

6 "California courts have consistently characterized bonus and profit sharing plans as
 7 constituting an *offer* of the stated benefits in exchange for the service of an
 8 employee, and upon the employee's *completion of the required services in*
 9 *accordance with the terms of the plan*, a binding contract is formed under which the
 employer is obligated to deliver the promised benefits." *Id.* (emphasis added and in
 original).

10 *The specific terms of the incentive compensation plan at issue are controlling* in
 11 determining whether an employee is entitled to payments under the plan as "wages." *See*
 12 *Neisendorf, supra*, 143 Cal.App.4th at 522 ("[E]ligibility for bonus payments is properly
 13 determined by the bonus plans' specific terms and general contract principles."); *Beckman v.*
 14 *Umpqua Bank*, 2007 WL 2418686, *2 (E.D. Cal. 2007) (employee's eligibility for a bonus
 15 payment is "properly determined by the specific terms of the bonus plan and general contract
 16 principles"); *Lucian v. All States Trucking Co.*, 116 Cal.App.3d 972, 976 (1981) ("[A] specific
 17 bonus plan normally becomes binding as a unilateral contract when the employee begins
 18 performance. . . . It does not follow, however, that the employee thereupon becomes entitled to
 19 bonus payment where . . . the bonus did not become payable until a certain date and the employee
 20 voluntarily left his position before that date."); *Hunter v. Sparling*, 87 Cal.App.2d 711, 724 (1948)
 21 (holding that employee who was fired before the bonus payment date was not entitled to receive a
 22 bonus payment where the bonus plan required him to be employed on that date); *Stevens v.*
 23 *Mavent, Inc.*, 2008 WL 2824956, *5 (C.D. Cal. 2008) (holding that performance bonuses are not
 24 properly considered "wages" as defined in the Labor Code because the terms and conditions by
 25 which the bonuses would be earned were not met).

26 In *Neisendorf*, the California Court of Appeal held that the plaintiff could not establish a
 27 claim for lost wages under the Labor Code based on forfeited bonus payments on facts similar to
 28 those alleged here. The plaintiff was permitted to participate in the employer's Annual Incentive

1 Plan ("AIP"), which provided that a participant must be an active employee of the company on the
 2 payment date in order to receive an AIP payment. 143 Cal.App.4th at 521. The AIP further stated:
 3 "If an employee is involuntarily discharged (e.g. poor performance or misconduct) prior to the AIP
 4 payment date, that employee will have no right to AIP." *Id.* The plaintiff's employment was
 5 terminated for unsatisfactory performance prior to the payment date for the 2002 AIP bonus
 6 payment, and, accordingly, the employer refused to pay the bonus. The plaintiff claimed, as do
 7 the Plaintiffs in this action, that the employer had committed an unlawful forfeiture of wages
 8 under the Labor Code by refusing to pay the bonus. *Id.* at 522.

9 The Court of Appeal disagreed, holding that the plaintiff's Labor Code claims were barred,
 10 because it is *only after all agreed-to conditions are fulfilled* that a promised bonus can be
 11 considered "wages" under California law. *Id.* at 524. Because the plaintiff was no longer
 12 employed on the bonus payment date, the promised bonus could not constitute earned "wages" and
 13 the refusal to pay them did not violate the California Labor Code. *Id.*

14 Likewise, in *Prachasaisoradej, supra*, the California Supreme Court held that the
 15 employer's incentive compensation plan did not violate statutory wage protection policies because
 16 the *conditions precedent to receipt of incentive compensation under the terms of the employer's*
 17 *plan were not fulfilled*. As in *Neisendorf*, the court first held that the employees' expectations
 18 with respect to these payments *derived exclusively from the terms of the plan itself*. 42 Cal.4th at
 19 229. Under the terms of the employer's plan at issue, an employee's entitlement to incentive
 20 compensation payments arose only under a formula that compared the store's actual plan-defined
 21 profit, if any, for a specified period, with target figures previously set by the company. Therefore,
 22 entitlement depended on (1) whether the store's overall operations for the period had been
 23 profitable, as the plan defined profitability, and (2) how any such profit compared to goals or
 24 targets previously set for the store. *Id.* *Only after these two conditions were fulfilled did the*
 25 *incentive compensation payments become earned "wages"* that the individual employees were
 26 entitled to receive. *Id.* at 237. Accordingly, the court reversed the decision of the Court of
 27 Appeal, which had reversed a judgment of dismissal in favor of the Defendant. *Id.*

28 More recently, late last year the California Supreme Court decided *Schachter v. Citigroup*,

1 *Inc.*, 47 Cal.4th 610, 621-22 (2009), which affirmed an order granting summary judgment to the
 2 employer in a wage payment suit. Consistent with the *Neisendorf* and *Prachasaisoradej*
 3 decisions, the court held that an employee who voluntarily terminates his employment ***before his***
 4 ***restricted stock grants are fully vested*** under the terms of the employer's incentive compensation
 5 plan ***is not entitled to those unvested shares as wages under the Labor Code***. *Id.* In *Schachter*,
 6 the plaintiff was employed as a stock broker by Smith Barney. At the time of his voluntary
 7 termination, Schachter had accumulated several shares of unvested stock under the plan, which he
 8 forfeited as a result of his failure to satisfy the plan's two-year vesting period prior to his
 9 resignation. *Id.* Schachter sued Citibank (which had acquired Smith Barney), alleging that his
 10 shares of unvested stock constituted a "wage" that was "earned but unpaid," and therefore
 11 unlawfully forfeited in violation of the California Labor Code. *Id.*

12 Citing to *Neisendorf*, the California Supreme Court stated, "[o]nly when an employee
 13 ***satisfies the condition(s) precedent to receiving incentive compensation***, which often includes
 14 ***remaining employed for a particular period of time***, can that employee be said to have ***earned*** the
 15 incentive compensation (thereby necessitating payment upon resignation or termination)." *Id.*
 16 (emphasis added). Accordingly, in rejecting Schachter's argument, the California Supreme Court
 17 noted as follows:

18 ". . . Schachter's bargained-for 'wages' have been paid in full. . . . The only thing
 19 that has not been 'paid' is ***something Schachter never 'earned' – fully vested***
 20 [company] stock. Schachter therefore has ***no claim*** under [section] 201 or [section]
 21 202. * * * Here, ***Schachter's actions*** [resigning his employment] – not the
 22 company's – ***resulted in the loss of Schachter's contingent incentive***
 23 ***compensation***. As such, Schachter is not entitled to 'gather the fruit' because he
 24 ***failed to perform the condition necessary*** to do so – in this case, ***remain employed***
 25 ***with the company until two years had passed*** from the date he received the
 26 unrestricted stock. We conclude that the Plan's forfeiture provision does not run
 27 afoul of section 201 or 202 because ***no earned wages remain unpaid upon***
 28 ***termination for cause or resignation***." *Id.* at 622-623 (emphasis added).

25 Here, Plaintiffs have not alleged that they were denied any awards which had *vested* under
 26 any of the Plans. Moreover, Plaintiffs could not allege or establish that they were denied payment
 27 of any *vested* awards because they were paid for all of their awards under the Plans that had *vested*
 28 as of the time they resigned their employment at Merrill Lynch. Waller Decl., ¶¶ 7-11. As in

1 *Schachter and Neisendorf, no earned wages related to incentive compensation remained unpaid*
 2 *upon Plaintiffs' termination.* Therefore, Defendants are entitled to judgment in their favor on
 3 Plaintiffs' First Cause of Action for Recovery of Unpaid Wages under the California Labor Code.

4 **D. The Second Cause Of Action For Violation Of The UCL Is Without Merit.**

5 A claim for violation of the UCL is a derivative one which must be based on an alleged
 6 violation of some other statute or law, or "unfair" business competition which violates antitrust
 7 laws, or the policy or spirit of such laws. *See Prachasaisoradej, supra*, 42 Cal.4th at 244;
 8 *Steinhebel v. Los Angeles Times Commc'ns*, 126 Cal.App.4th 696, 712 (2005); *Cel-Tech*
 9 *Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 187 (1999) ("*Cel-*
 10 *Tech*"); *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138
 11 Cal.App.4th 1215, 1225 (2006).

12 Plaintiffs' UCL claim contains no allegation which could establish a violation of any
 13 statute or law under these standards. This claim is based on an allegation that Defendants violated
 14 the UCL because the Plans contain allegedly unlawful forfeiture provisions that prohibited them
 15 from working for competitors in violation of *Cal. Bus. & Prof. Code* § 16600. Kane Decl., Exh.
 16 A, ¶¶ 21-22. However, as discussed above, Plaintiffs did not forfeit any awards under the Plans
 17 based on their purported work for any Merrill Lynch competitor. The only awards which were
 18 "forfeited" were those which were *unvested* under the express terms of the Plans at the time
 19 Plaintiffs resigned their employment. Thus, Plaintiffs have not alleged – and cannot allege or
 20 prove – any facts which could support their UCL claim as alleged in the Second Cause of Action.

21 Further, a UCL claim cannot be maintained in the absence of factual allegations sufficient
 22 to establish entitlement to *restitution* or *injunctive relief*; damages are not recoverable under the
 23 UCL. *See Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App.4th 798, 812 (2007); *see also*
 24 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 110-51 (2003) (dismissing
 25 plaintiff's UCL claims on grounds that such non-restitutionary relief is not available under the
 26 UCL); *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950 (2002) (holding that the UCL provides only for
 27 restitution and injunctive relief); *Cel-Tech*, 20 Cal.4th at 179 ("Plaintiffs may not receive
 28 damages" under the UCL). Indeed, restitution is the only monetary relief available to private

1 plaintiffs under the UCL. *Clark v. Superior Court*, 174 Cal.App.4th 82, 90 (2009). In the context
 2 of the UCL, "restitution" is only available where a defendant receives money in which the plaintiff
 3 had an ownership interest, and where the money was taken from the plaintiff through an unfair
 4 business practice. *See Korea Supply*, 29 Cal.4th at 1144-1145; *Kraus v. Trinity Management*
 5 *Services, Inc.*, 23 Cal.4th 116, 126-127 (2000); *Madrid v. Perot*, 130 Cal.App.4th 440, 453 (2005);
 6 *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal.App.4th 997, 1012-1013 (2005).

7 Here, Plaintiffs have not alleged any facts which could establish a right to restitution or
 8 injunctive relief. Indeed, they have not alleged that Defendants received any money in which
 9 Plaintiffs had an ownership interest. On the contrary, as set forth above, Plaintiffs received
 10 compensation for all *vested* awards as of the time they resigned their employment, and they only
 11 "forfeited" awards which were *unvested* as of that time. Waller Decl., ¶¶ 7-11. Thus, because
 12 Plaintiffs had no ownership interest in any *vested* awards under the Plans, they have no right to
 13 restitution. For the same reason, Plaintiffs cannot establish any basis for injunctive relief.

14 Accordingly, in addition to the fact that Plaintiffs have not alleged a violation of any law or
 15 statute to support their UCL claim, they have not alleged any basis for restitution or injunctive
 16 relief. Therefore, Defendants are entitled to judgment in their favor on Plaintiffs' Second Cause of
 17 Action for Violation of the UCL.

18 **E. The Third Cause Of Action For Conversion Fails As A Matter Of Law.**

19 The elements of a claim for conversion are: (1) the plaintiff's ownership or right to
 20 possession of the property; (2) the defendant's conversion by wrongful act inconsistent with the
 21 property rights of the plaintiff; and (3) damages. *See, e.g., Cho v. The Republic of Korea*, 66 Fed.
 22 Appx. 124, 126 (9th Cir. 2003); *Oakdale Village Group v. Fong*, 43 Cal.App.4th 539, 543-544
 23 (1996). Here, Plaintiffs' Third Cause of Action for Conversion is based on an allegation that
 24 Merrill Lynch "illegally converted the property of Plaintiffs" by refusing to pay their awards under
 25 the Plans. Kane Decl., Exh. A at ¶ 26. However, as discussed above, Plaintiffs cannot establish
 26 the requisite "ownership" or "right" to the awards because, at the time they resigned, all *vested*
 27 awards under the Plans had already been paid to them and all other awards were *unvested* under
 28 the terms of the Plans. Waller Decl., ¶¶ 7-11. Accordingly, their conversion claim is barred.

Further, to the extent that Plaintiffs' conversion claim is based on the alleged forfeiture of earned wages as alleged in their First Cause of Action for Recovery of Unpaid Wages, it is still barred. Under California law, there is no cause of action for conversion based on Labor Code violations. *See Thomas v. Home Depot USA Inc.*, 527 F.Supp.2d 1003, 1009-1010 (N.D. Cal. 2007); *Wal-Mart Stores, Inc. Wage and Hour Litigation*, 505 F.Supp.2d 609 (N.D. Cal. 2007); *Pulido v. Coca-Cola Enterprises, Inc.*, No. EDCV06-406VAP(OPX), 2006 U.S. Dist. LEXIS 43765 (C.D. Cal. May 25, 2006); *Green v. Party City Corp.*, No. CV-0109681, 2002 U.S. Dist. LEXIS 7750 (C.D. Cal. Apr. 9, 2002).

Accordingly, Defendants are entitled to judgment in their favor on Plaintiff's Third Cause of Action for Conversion.

F. The Fourth Cause Of Action For Breach Of Fiduciary Duty Is Barred.

Plaintiffs' Fourth Cause of Action is based on allegations that Defendants breached their fiduciary duties under the FACAAP by not making adjustments to counteract the "unusual and extraordinary events" that "materially affected the value of Merrill Lynch's common stock." Kane Decl., Exh. A at ¶¶ 30-31. As alleged, this claim is based on an alleged breach of fiduciary duty arising under the common law, which is barred as a matter of law.

As this Court ruled in its January 22, 2010 Order granting in part the Independent Director Defendants' Motion to Dismiss, fiduciaries are "not required to insure against losses, only to act with care, prudence, and diligence under the circumstances," and no claim for breach of fiduciary duty is established merely by alleging that a company took a risk and suffered a loss. *Id.*, Exh. D (Dkt. #79) at 9:3-8. In so ruling, this Court held that:

By its plain language, [the FACAAP plan document] merely provides the Independent Directors with authority to make adjustments to the number of shares and method of calculating the awards. [It] does not impose any fiduciary duty on the Independent Directors, mandating that they takes such actions when "unusual or extraordinary" events occur. *Id.* at 7:18-8:5.

These findings compel the conclusion that the Fourth Cause of Action likewise fails to state a claim for common law breach of fiduciary duty against the Merrill Lynch Defendants as well. Simply put, it is axiomatic that, if the Independent Director Defendants owed no fiduciary

1 duty to Plaintiffs to take the actions alleged in the Complaint, the Merrill Lynch Defendants
 2 likewise owed no such fiduciary duty to them as well. Therefore, Defendants are entitled to
 3 judgment in their favor on Plaintiff's Fourth Cause of Action for Breach of Fiduciary Duty.

4 **G. The Fifth Cause Of Action For ERISA Violations Fails As A Matter Of Law.**

5 **1. The FACAAP Is Not An ERISA Plan, As The Court Previously Ruled.**

6 As this Court has already properly concluded, the FACAAP does not qualify as an
 7 "employee pension benefit plan" under ERISA. Kane Decl., Exh. D (Dkt. #79) at 5:26-6:6.
 8 Accordingly, to the extent Plaintiffs' Fifth Cause of Action for Violation of ERISA is based on the
 9 FACAAP violating ERISA's minimum vesting standards and breach of fiduciary duties owed
 10 under ERISA, Defendants are entitled to judgment in their favor on that claim.

11 The remaining aspects of the allegations of Plaintiffs' purported Fifth Cause of Action are
 12 limited solely to whether the Growth Plan and the WealthBuilder Plan "violate the minimum
 13 vesting standards set forth in 29 U.S.C. § 1053(a)." Kane Decl., Exh. A at ¶ 37. As we discuss
 14 next, the Growth Plan is not an ERISA employee pension benefit plan which would be subject to
 15 those standards, and the WealthBuilder Plan is an ERISA "top hat" plan which is exempt from
 16 those standards.

17 **2. The Growth Plan Also Is Not An ERISA Retirement Plan.**

18 Like the FACAAP, the Growth Plan is not a retirement plan under ERISA. A plan is
 19 covered by ERISA only if it provides *retirement income* or results in a *deferral of income* by
 20 employees for periods extending to the termination of covered employment or beyond. *See* 29
 21 U.S.C. § 1002(2); *Roderick v. Mazzetti & Assocs.*, No. C 04-2436, 2004 WL 2554453, * 8 (N.D.
 22 Cal. Nov. 9, 2004). Courts have uniformly concluded that a pension plan is established under
 23 ERISA only if "a reasonable person could ascertain the intended benefits, beneficiary, source of
 24 financing, and procedures for receiving benefits." *See, e.g., Scott v. Gulf Oil Corp.*, 754 F.2d
 25 1499, 1504 (9th Cir. 1985); *Donovan v. Dillingham*, 688 F.2d 1367, 1363 (11th Cir. 1982).

26 In contrast, bonus plans and other plans which are merely intended to incentivize
 27 performance rather than to provide retirement income are not subject to ERISA's requirements.
 28 *See, e.g., Oatway v. American Int'l Group*, 325 F.3d 184, 188-189 (3d Cir. 2003); *In re Segovia*,

1 404 B.R. 896, 922 (9th Cir. 2009). Indeed, the regulations promulgated by the Department of
 2 Labor specifically exclude from the definition of an employee pension benefit plan those that
 3 involve “payments made by an employer to some or all of its employees as bonuses for work
 4 performed.” 20 C.F.R. § 2510.3-2(c).

5 Here, the Growth Plan does not provide for retirement income or deferred compensation as
 6 defined by ERISA. Rather, like the FACAAP – which this Court has already held is *not* an
 7 ERISA retirement plan – the stated purpose of the Growth Plan is to *incentivize performance*
 8 rather than provide retirement income:

9 “The Plan, established under the Financial Advisor Compensation Program as in
 10 effect from time to time is intended to be unfunded and *maintained primarily for*
 11 *the purpose of providing long-term incentive compensation*, subject to certain
 12 conditions, to a select group of financial advisors, who remain in the employ of the
 Company until completion of the period of service specified in this Plan.” Waller
 Decl., Exh. B at § 1 (emphasis added).

13 In keeping with its stated purpose to *incentivize performance*, the Growth Plan provides
 14 that the criteria for awards “will be established periodically by the Advisory Division” and “may
 15 vary from Performance Period to Performance Period and according to the type of performance.”
 16 *Id.*, at § 3.1(b). Awards under the Growth Plan are *not guaranteed* and *cannot be quantified*, as
 17 they are generally “stated as an amount equal to a percentage of achievement against established
 18 goals during a Performance Period.” *Id.*

19 Thus, by its express terms, the Growth Plan provides for performance-based incentive
 20 compensation and *does not have a retirement purpose* or provide for a “systematic deferral of
 21 income.” In its January 22, 2010 Order, this Court concluded, based on similar provisions, that
 22 the FACAAP Plan was not subject to ERISA as well, reasoning as follows:

23 By its express terms, the FACAAP does not have a retirement purpose or provide a
 24 systematic deferral of compensation. Rather, it is clear the FACAAP is intended
 25 merely as a bonus program to award top performing employees and provide
 26 financial incentive for employees to remain with Merrill Lynch and improve their
 27 performance there. There is nothing in the FACAAP that would allow a reasonable
 28 person to calculate or determine the benefits of the plan or procedure for receiving
 benefits, as those matters are left to the sole discretion of Merrill Lynch.
 Additionally, no employee is guaranteed awards under the FACAAP; he or she is
 given awards only according to the company’s assessment of his or her
 contribution of the financial well-being of the company. Accordingly, the

1 FACAAP does not qualify as an “employee pension benefit plan” under ERISA.
 2 Kane Decl., Exh. D (Dkt. #79) at 5:26-6:6.

3 Here, the Court should likewise conclude that the Growth Plan is not an employee pension
 4 benefit plan under ERISA because, like the FACAAP, it does not have a retirement purpose or
 5 provide for a “systematic deferral of income.”⁴ Therefore, to the extent Plaintiffs' Fifth Cause of
 6 Action for Violation of ERISA is based on the Growth Plan violating ERISA's minimum vesting
 7 standards, Defendants are entitled to judgment in their favor on that claim.

8 **3. The WealthBuilder Plan Is A "Top Hat" Plan Which Is Exempt From**
 9 **ERISA's Vesting Provisions.**

10 Pursuant to 29 U.S.C. § 1101(a)(1), ERISA covers an employee benefit plan “other than”
 11 one which falls into the following category:

12 “[A] plan which is unfunded and is maintained by an employer primarily for the
 13 purpose of providing deferred compensation for a select group of management or
 highly compensated employees . . .” 29 U.S.C. § 1101(a)(1).

14 This section sets forth a statutory exemption for plans which are commonly referred to as
 15 “top hat” plans, which are not subject to the fiduciary, vesting, funding, and participation
 16 provisions of ERISA. *See* 29 U.S.C. §§ 1101(a)(1), 1081(a)(3), 1051(2); *Gilliam v. Nevada*
 17 *Power Co.*, 488 F.3d 1189, 1192-1193 (9th Cir. 2007); *Duggan v. Hobbs*, 99 F.3d 307, 310 (9th
 18 Cir. 1996); *Fields v. Thompson Printing Co.*, 363 F.3d 259, 274 (3d Cir. 2004); *Pane v. RCA*
 19 *Corp.*, 868 F.2d 631, 637 (3d Cir. 1989); *Demery v. Extebank Deferred Compensation Plan (B)*,
 20 216 F.3d 283, 288 (2d Cir. 2000). Top hat plans are exempt from the ERISA provisions
 21 applicable to employee benefit plans because they only apply to highly paid executives, who have
 22 a strong bargaining position relative to their employers. *See Fields*, 363 F.3d at 274. Where, as
 23 here, the plain language of a top hat plan shows that the plan is *unfunded* and maintained

24 _____
 25 ⁴ Although the Growth Plan contains a provision for post-retirement payments, that
 26 provision does not transform the Plan into an ERISA Plan. As the Court properly noted in its
 27 January 22, 2010 Order, *where post-retirement payments are incidental to the goal of*
 28 *supplementing current compensation, such payments do not constitute a “deferral of income”*
which could subject the plan to ERISA. Kane Decl., Exh. D (Dkt. #79) at 6:7-17.

1 primarily for the purpose of providing *deferred compensation* for a *select group of management*
 2 *or highly-compensated employees*, a motion under Rule 12 should be granted as to claims which
 3 are not applicable to a top hat plan. *See, e.g., In Re: IT Group, Inc.*, 305 B.R. 402, 410 (D. Del.
 4 2004) (granting motion to dismiss and finding that because plan documents track ERISA language
 5 limiting participants to select group of management or highly compensated employees, the "plain
 6 language of the Deferred Compensation Plan leaves little room for the . . . Plaintiffs to prevail");
 7 *Cogan v. Phoenix Life Ins. Co.*, 310 F.3d 238, 242 (1st Cir. 2002) (granting Rule 12(b)(6) motion
 8 to dismiss ERISA claims based on plain language of the plan, which recited the statutory
 9 definition for a top hat plan).

10 In *Cogan, supra*, the First Circuit affirmed an order that granted a Rule 12 motion to
 11 dismiss on facts similar to those present in this case. 310 F.3d at 242. The plaintiffs in *Cogan*
 12 were sales representatives who participated in a deferred compensation plan which the plaintiffs
 13 alleged violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g)(1). *Id.* at 241. The Court of
 14 Appeals first noted that the district court had properly reviewed the plan documents under Rule 12
 15 because they were "integral to" or "relied upon" in the complaint. *Id.* The court then held that the
 16 motion to dismiss the ERISA claim had been properly granted based solely on the plain language
 17 of the plan document, noting as follows:

18 "The anti-cutback provision does not apply here, however, as the Plan is
 19 unquestionably a 'top hat' employee benefit plan. ERISA describes such a plan as
 20 'unfunded' and 'maintained by an employer primarily for the purpose of providing
 21 deferred compensation for a select group of management or highly compensated
 22 employees.' The Plan itself echoes this statutory definition, stating that 'this Plan
 23 is an unfunded plan for a select group of highly compensated Participants.' Thus,
 24 plaintiffs cannot dispute . . . that the Plan is a top hat plan within the meaning of
 25 ERISA. Top hat plans are expressly exempted from ERISA's anti-cutback
 26 provision." *Id.* at 242 (internal citations omitted).

27 Here, the WealthBuilder Plan is a top hat plan which is exempt from the vesting, funding,
 28 fiduciary, and participation provisions of ERISA under the foregoing standards. The Plan, at
 Article 1, recites ERISA's top hat plan requirements:

1 The Plan, established under the WealthBuilder Program as in effect from time to
 2 time, is intended to be *unfunded* and maintained primarily for the purpose of
 3 providing *deferred compensation* for the *members of a select group of*
 4 *management or highly compensated employees*, within the meaning of Title 1 of
 5 ERISA, *who remain in the employ of the company until retirement or*
 6 *completion of a substantial period of service as specified in this Plan*. Waller
 7 Decl., Exh. C, p. 1 at Art. 1 (emphasis added).

8 The WealthBuilder Plan also expressly provides that participation is limited to a particular
 9 select group of management or highly compensated employees:

10 **3.1 Participation**

11 (a) **General Rule.** An eligible employee will be a Participant in any year
 12 only if he or she (i) has more than \$250,000 of Eligible Compensation in both the
 13 Qualification Year and the year in which the award is made, (ii) has attained at least
 14 the title of Vice President or holds a Advisory Division Management position with
 15 the Company (a “Advisory Manager”),

16 (b) **Newly Employed Individuals.** Subject to the approval of the
 17 Administrator in his or her sole discretion, an Eligible Employee who is newly
 18 employed by the Company can be a Participant if his or her Eligible Compensation
 19 is greater than \$250,000, [and he or she is either employed as a Advisory Division
 20 Manager or is to be nominated for at least the title of Vice President at the first
 21 opportunity following the individual’s commencement of employment with the
 22 Company.] *Id.*, at § 3.1(a), (b).

23 Indeed, since January 1, 2005, less than 15% of Merrill Lynch’s total workforce has been
 24 eligible to participate in the WealthBuilder Plan each calendar year, and the average compensation
 25 of the participants in the plan has been more than double that of all Merrill Lynch employees.
 26 Waller Decl., ¶ 6.

27 Thus, as a matter of law, the WealthBuilder Plan is a top hat plan under Title 1 of ERISA
 28 because it is *unfunded*, and it exists “primarily to provide benefits to a select group of
 management or highly compensated employees.” The Plan is therefore exempt from the
 fiduciary, vesting, funding, and participation provisions of ERISA. Accordingly, to the extent
 Plaintiffs’ Fifth Cause of Action for Violation of ERISA is based on the WealthBuilder Plan
 violating ERISA’s minimum vesting standards, Defendants are entitled to judgment in their favor.

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1 **IV. CONCLUSION**

2 For all the foregoing reasons, Defendants respectfully request that this Motion be granted
3 and that judgment be entered in their favor on Plaintiffs' Complaint and each and every purported
4 cause of action alleged therein.

5
6 DATED: May 28, 2010

McGUIREWOODS LLP

7
8 By: /s/ Matthew C. Kane

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